SUPREME COURT, U. S.

No. 611

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON, *Petitioner*,

v.

FEDERAL POWER COMMISSION; and CITY OF SEATTLE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CITY OF SEATTLE IN OPPOSITION

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BRIEF FOR THE CITY OF SEATTLE IN OPPOSITION

QUESTIONS PRESENTED

The questions posed by petitioner (Pet. 3-5), herein called PUD, present no challenge to the basic finding by the Federal Power Commission that immediate construction by Seattle of Boundary project is necessary to the public interest. PUD's contentions relevant to this basic finding were rejected by the Commission after full hearing. PUD's contentions as to the three questions it seeks to have reviewed here were also rejected unanimously by both the Commission and by the Court of Appeals. As to the first two of these questions, the decisions below were based on principles well settled by this Court; as to the third, the "conflict of interest" issue, PUD's claims rest upon factual assumptions which the FPC and the Court of Appeals refused to accept. In our view, these three ques-

tions, the first two of which present alternative approaches to the same issue, should be restated as follows:

1. Whether the Court of Appeals erred in holding that Seattle, licensed by FPC to construct a major hydroelectric project on a navigable stream, can acquire by condemnation under Section 21 of the Federal Power Act unimproved, unused lands of the PUD, necessary for construction of Seattle's project, but useful to the PUD only in connection with a project which conflicts with Seattle's and which project FPC has refused to license, irrespective of a Washington statute (RCW § 35.84.030) alleged to prevent a city from condemning an "electric power and light plant or electric system" owned by a PUD.

2. Whether, alternatively to its holding under question 1 above, the Court of Appeals erred in deciding that the PUD lands in question were not part of its electric system, rather than deferring decision to await the outcome of an action in the Washington court in which the PUD seeks to litigate the same question.

3. Whether the Court of Appeals erred in refusing to set aside an FPC license on the ground that one of several feasibility designs presented by the licensee in support of its application was prepared by a consulting firm which hired design engineers to work on technical features of the plan in their off-duty hours from regular Bureau of Reclamation employment.

COUNTERSTATEMENT OF THE CASE

The Federal Power Commission granted a license under the Federal Power Act (16 U.S.C. §§ 791a-825r) in 1961 to the City of Seattle to construct a 97 million dollar hydroelectric project on the Pend Oreille River, a major tributary of the Columbia River system and a navigable water of the United States, at a site known as Boundary, located in northeastern Washington. This action culminated an extended proceeding before FPC, beginning with the filing

by Seattle in 1953 of an application for a preliminary permit. Seattle, which owns and operates the second largest municipal electric utility in the United States, has provided for its needs through constructing its own generating resources since 1905, when its first hydro plant went on the line. It applied for Boundary to keep pace with growing demands upon it for electric service. FPC granted a three-year permit in 1954, over the opposition of the Pend Oreille County PUD, petitioner here (13 F.P.C. 1353).

Studies conducted during the first two years of the permit period by engineers on Seattle's own staff showed that a Boundary dam with a reservoir extending 17 miles upstream to the tailwater of the PUD's Box Canyon project, then under construction as FPC Project No. 2042, would provide for a power plant with an ultimate installed capacity of 810,000 kilowatts. Seattle then retained J. L. Savage and Associates of Denver as consultants to prepare feasibility designs for the project from the preliminary plans and other information already developed.

In July of 1957 Seattle filed its license application with FPC for a high dam at Boundary. The PUD intervened and, about a year later, filed an application for a low dam at Z Canyon, one mile upstream from the Boundary site. These conflicting applications were then consolidated for a hearing which consumed 126 days from January 1959 to February 1960, producing a transcript exceeding 17,200 pages. The Presiding Examiner and the Commission found, under Section 10(a) of the Act (16 U.S.C. § 803(a)), that Seattle's Boundary project is best adapted to a comprehensive plan for improving and developing the waterway for the use or benefit of interstate or foreign commerce, and for the improvement and utilization of water power development. Conversely, the PUD's application was rejected on the grounds that any dam at Z Canyon was not comprehensive development of the waterway, that the PUD lacked ability to finance even a low dam and that the PUD had no need for the power. The Court of Appeals upheld the Commission in all respects.

Of the issues raised before the Examiner, the Commission and the Court of Appeals in the nine years of proceedings below, petitioner would bring two to this Court. One, which embraces two of the three questions stated in the petition, relates to the alleged inability of Seattle to condemn PUD land rights within the proposed reservoir. The second relates to an alleged "conflict of interest" said to arise out of the employment by J. L. Savage and Associates of Bureau of Reclamation personnel who assisted in design work on one of the City's proposals. Both of these matters were considered extensively throughout the hearing, in the ensuing briefs, by the Examiner in his decision, by the Commission in two separate orders and by the Court of Appeals. On both matters all of these decisional levels held without dissent against the PUD. When the full facts are considered, any doubt as to the soundness of these unanimous conclusions disappears.

Alleged inability of Seattle to condemn PUD lands

The land rights in question are neither necessary nor useful to the PUD's upstream Box Canyon project. They happened to be included as part of a package of interests acquired in connection with Box Canyon for $20,100. For the most part they consist of shorelands, constituting a narrow, totally unimproved belt between the ordinary high and low water marks of the Pend Oreille River. They also include acreage near the proposed Z Canyon damsite, a portion of which will be inundated by Boundary reservoir. The Examiner and the Commission found the facts against PUD on its contention that the properties were "parts of the PUD's electric power and light plant or electric system." (SJA 229.)[1] The Commission also held that the

[1] The same designations are used as employed by petitioner, i.e., "R." refers to the record as certified to this Court by the Court of Appeals. "JA" and "SJA" refer respectively to the Joint Appendix and Supplemental Joint Appendix, as reproduced for the Court of Appeals. "Tr." refers to the transcript of record certified by FPC to the Court of Appeals.

alleged prohibition in Section 35.84.030 of the Revised Code of Washington (1951) could not bar Seattle, as a federal licensee, from taking the lands necessary for Boundary project because:

> ". . . In our opinion Seattle's right to acquire these properties by the exercise of the power of eminent domain under Section 21 of the Federal Power Act is well established. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99; *City of Tacoma* v. *Taxpayers, supra* [357 U.S. 320]; *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152; *State of Washington Department of Game* v. *FPC*, 207 F. 2d 391, cert. den. 347 U.S. 936. And as we found in our order issuing license, Seattle has submitted satisfactory evidence of compliance with the requirements of all applicable state laws insofar as necessary to effect the purposes of the license." (SJA 316.)

At the same time that it sought review of the Commission's orders by the District of Columbia Circuit, the PUD sought a declaratory judgment against the City through a nominal taxpayer in the state courts of Washington (*Beezer* v. *City of Seattle*, 160 Wash. Dec. 241, 373 P.2d 796, further opinion, 160 Wash. Dec. 652, 375 P. 2d 256). In that case the PUD relied on the same ground that it did before the Circuit Court of Appeals, namely that RCW § 35.84.030 was a bar. The lower Washington state court dismissed the *Beezer* suit on summary judgment on the ground that under *City of Tacoma* v. *Taxpayers*, 357 U.S. 320 (1958) it was an impermissible collateral attack upon the license granted Seattle and the exclusive federal review proceedings thereof specified by Congress in Section 313(b) of the Federal Power Act (16 U.S.C. § 825*l*(b)). On appeal the Washington Supreme Court, in a 6-3 decision entered July 12, 1962, reversed on the narrow ground that the meaning of RCW § 35.84.030 might be relevant if the federal courts in their exclusive review proceedings determined that the Washington law was not superseded by Section 21 of the Federal Power Act. Since

the federal courts had not yet spoken, the court ordered the *Beezer* case remanded for trial on the issue whether the PUD's lands were part of its "electric power and light plant or electric system," within the meaning of the Washington statute.

On August 30, 1962, the Court of Appeals, despite the PUD's having brought the *Beezer* decision to its attention (see Pet. App. A-1), rejected the PUD's appeal in an unanimous opinion by Chief Judge Miller.

Use of Bureau employees by Seattle's design engineers

J. L. Savage and men associated with him in his engineering firm had for some twelve years before the hearings in this case were opened in 1959 been design consultants for Seattle's Department of Lighting (JA 15, 84-85). As Chief Design Engineer for the Bureau of Reclamation before his retirement, Dr. Savage had been in charge of design work involving the City's huge Ross Dam on the Skagit River (FPC Project No. 553) under a contract between Seattle and the Bureau of Reclamation (JA 174-176). When Savage retired from the Bureau, design work on Ross and other Seattle projects such as FPC licensed Gorge and Diablo dams, continued under Savage's direction as consulting engineer. Work for Seattle by the J. L. Savage firm over the years also included a variety of other projects requiring specialized technical knowledge not available on the City's own engineering staff.

In the course of its work for Seattle, the Savage firm had called upon the reservoir of engineering talent in Denver consisting chiefly of retired Reclamation Bureau personnel, as well as enginers currently employed by the Bureau, working however completely outside their hours of federal employment and with full knowledge and official approval of the Bureau of Reclamation (JA. 83-84). No government materials or facilities were used in the work (JA 42). The firm received payment from Seattle for the work done and in turn paid individual engineers on an

hourly basis (JA 32-33, 79-80). The PUD itself had utilized the Savage organization (JA 85), including a Bureau employee (JA 90-91), in connection with its FPC licensed Box Canyon project.

In view of its long and successful employment of the Savage firm, the City turned to it in 1956 in connection with feasibility studies for Boundary. The PUD knew of the City's employment of Savage and of the participation of Mr. Winter and other Bureau employees in developing the Boundary design as early as 1956 (JA 16). In addition, the Savage design drawings, all marked "Approved, J. L. Savage, Consulting Engineer" (Tr. 17717) were included in the application filed with FPC in July of 1957. It was these drawings, and testimony in explanation and support of them, which were presented at the hearings through Messrs. Hammond and Winter.[2] Mr. Hammond, who had become a principal in the Savage firm upon his retirement from the Reclamation Bureau in 1955, had general supervision of the work for the City and testified on the dam design. Mr. Winter had responsibility, under Mr. Hammond, for the power features (JA 31, 81-82).

The work performed by Bureau employees for J. L. Savage and Associates on the Boundary project was authorized by long standing administrative regulations and practice of the Bureau of Reclam tion (JA 201). Bureau of Reclamation regulations in effect when this out-

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[2] Mr. Winter not only had Bureau permission to work on Boundary for the Savage firm but specific written permission to testify from the Assistant Secretary of the Interior. Mr. Winter's testimony, which was given under subpoena, was not in any official capacity as a Bureau employee but in the role of any federal employee called to testify as a private citizen in a legal proceeding concerning which he has knowledge. This was made clear in Mr. Winter's testimony (JA 29, 57) and in a letter from the Assistant Secretary of the Interior to the FPC Examiner, which noted that ". . . in testifying, Mr. Winter was not doing so on behalf of the Department, nor stating its position on any of the pending issues." (JA 90.)

side work was authorized provided that such employment was prohibited only if contrary to the interests of the government or if likely to conflict with official duties (JA 20-23). Each request had to be in writing, made a part of the employee's official records and be acted upon by "Regional Directors and heads of operating offices." (JA 41-42, 45.)

The work of the Savage firm was limited to design of a layout for the site and development of a cost estimate for executing the plan and did not extend to problems relating to protection of the mineral resources adjacent to the reservoir, about which the Department of Interior expressed concern. By prehearing conference stipulation, the hearing was divided into two separate phases, first, engineering and economic feasibility of the competing applications, and second, issues relating to geology and mining (JA 5-6). Mr. Winter's testimony and the work of other Bureau personnel was confined to the first part of the hearing.

The Reclamation Bureau and the Corps of Engineers agreed in 1950 that, "[w]ithin the field of multi-purpose storage projects and of power projects . . ." responsibility for conducting new investigations and of continuing investigations already launched should be assigned to the Corps for the Pend Oreille River below the confluence of the Clark Fork and to the Bureau upstream from that point (JA 24). The Bureau thus retained for the reach of the river in question only its traditional interest with respect to water supply for irrigation. Mr. Winter's testimony in no way related to irrigation, but was limited strictly to power features of the Boundary development (JA 57-58). The Bureau of Reclamation was in no way interested in the proceedings, except to recommend to the Commission inclusion in any license to be issued the usual stipulation concerning stream-flow for irrigation purposes which the Bureau routinely requests in all FPC projects (JA 149).

Contrary to its present position that the Reclamation Bureau had an "interest" in the hearings (Pet. 12), the PUD represented to the Commission in its own application for a license for low Z Canyon, before it challenged Mr. Winter:

> "Irrigation and reclamation will not be involved or affected by any proposed development of the Project." (JA 128.)

Based on the record, the Examiner ruled on the matter of governmental "interest":

> ". . . More specifically the Bureau of Mines of the Department of the Interior has an interest in the proceeding with respect to the possible damage to the mining resources of the area. This interest has not, however, any relationship to the work which Winter did for the City of Seattle. In other words, there is no conceivable conflict of interest here involved as those terms are used (even by counsel for PUD) to describe Sections 2 and 281 of Title 18 of the Criminal Code." (SJA 232.)

The Commission's order of September 6 holds:

> ". . . On the record before us, we can find no conflict of interest which as a matter of policy would impel us to exclude the testimony and exhibits in question. And apart from such a conflict of interest as might require their exclusion as a matter of policy, we know of no basis in law or equity for excluding said testimony and exhibits. We cannot conclude, as PUD would have us do, that the appearance of Mr. Winter and the admission into evidence of exhibits prepared by him and others constitute an assault upon the 'integrity of the administrative process' which requires dismissal of Seattle's application." (SJA 317.)

And the Court of Appeals, after concluding that:

> ". . . Neither the Government nor any of its agencies has attacked the grant of a license to Seattle as being contrary to the public interest because of the alleged violations of § 281, and no criminal action has been

instituted against the parties accused by PUD." (Pet. App. B-4.)

held:

> "We find nothing in the record to indicate that there was here the 'influence peddling' at which § 281 was aimed. No corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers, and it does not appear that the Commission gave any more weight to the material furnished by the government employees than if it had been prepared by others." (Pet. App. B-5.)

ARGUMENT

I. THE COURT OF APPEALS DECISION UPHOLDING SEATTLE'S RIGHT TO CONDEMN PUD PROPERTY WAS BASED ON WELL SETTLED PRINCIPLES

A. The Court of Appeals, In Holding That the State Statute Is Superseded By Section 21 of the Federal Power Act, Is Not In Conflict With the Washingfon Court.

The PUD's statement that, "[t]he Court of Appeals decision establishes a direct conflict between the Court of Appeals and the highest court of the State of Washington . . ." (Pet. 16) is refuted by the opinions appended to the PUD's petition. The Washington Supreme Court recognized in its opinion filed July 12, 1962, that the federal courts alone could determine whether RCW § 35.84.030, insofar as it might bar Seattle from performing under its FPC license, was overriden by the Federal Power Act. The majority said:

> "Whether the Federal Power Commission can confer powers of condemnation on cities, which the state legislature has, as a matter of policy, expressly prohibited the federal courts must determine. . . ." (Pet. App. C-4.)

Any doubt as to the meaning of the July 12 decision was resolved by the further opinion filed October 2, 1962, in which the court denied a motion to dismiss made by the

City on the strength of the judgment of the Court of Appeals entered August 30, 1962. Although the Washington court denied Seattle's claim that *Beezer* was mooted by the Court of Appeals judgment, it was careful to place its decision on the narrow ground that Seattle's motion was premature:

> "We are advised that Public Utility District No. 1 of Pend Oreille County will petition the Supreme Court of the United States to review, by certiorari, the circuit court's affirmance of the order of the Federal Power Commission; and, pending such review, we do not accept the conclusions of the circuit court as res judicata of the issues heretofore determined by this court in its opinion of [July 12], 1962. Nor do the conclusions of the circuit court render moot the issues presented to us for determination, unless, and until, the judgment of the circuit court becomes final and binding on Public Utility District No. 1 of Pend Oreille County, Washington." (Pet. App. D-2.)

Where is the conflict which calls for certiorari? The Washington court agrees that the effect of Section 21 (16 U.S.C. § 814) is solely for the federal courts to determine. The Court of Appeals has determined that effect. Further proceedings in *Beezer* could become significant only if this Court were to overturn both of the Court of Appeals alternative holdings: (1) that the state statute "even if according to its own terms it is applicable, cannot make it impossible for Seattle as a federal licensee to condemn under the federal statute"; and (2) that "it does not appear that the land owned by PUD and needed by Seattle is a part of the former's electric plant or system which the Washington statute protects from condemnation by a city or town." (Pet. App. B-9.)

The Washington court's concurrence that the question of supersedure is exclusively a federal one is further demonstrated by its latest opinion in the City of Tacoma's marathon battle to construct its FPC licensed dams on the Cowlitz River. In that opinion, *City of Tacoma* v. *Tax-*

payers, 160 Wash. Dec. 64, 371 P. 2d 938 (1962), the Washington court quoted with approval these conclusions by the trial judge:

"'Congress had the constitutional power to enact the Federal Power Act, and in so doing it intended to exercise its full jurisdiction to authorize the Federal Power Commission to supersede state laws purporting to prohibit or limit the construction of dams on navigable streams. By passing the act, Congress preempted the entire field and authorized the Power Commission to issue licenses for such construction upon such conditions as it deemed proper, and the Federal Power Commission, in issuing its license to the Plaintiff [city of Tacoma], exercised that right and *delegated to the Plaintiff, its licensee, as its agent and the agent of the Federal Government, the right and power to complete and to thereafter operate the Cowlitz Project* in accordance with the terms and conditions of its license.' (Conclusion of Law VIII)

"'There are no state laws, measures or regulations, including Initiative 25 (Chapter 4, Laws of 1961) that limit, control or affect in any way, or that bar the rights of the plaintiff to finance, construct, complete and operate the Cowlitz Project under the provisions of the Federal Power Act and in accordance with the terms and conditions of its Federal Power License (Project No. 2016.)' (Conclusion of Law IX)

"'The United States has exclusive and paramount jurisdiction over navigable waters under the commerce clause of the United States Constitution and under the supremacy clauses of the United States and Washington State Constitutions, and, therefore, any state laws, measures or regulations, *whether such laws be in the form of prohibitions or curtailment or limitation of powers, or in any other form*, are inapplicable to the Mayfield and Mossyrock hydroelectric project insofar as the same are in conflict with the provisions of the Federal Power Act or the terms and conditions of Plaintiff's license for said project or which would enable the State of Washington or any State official thereof or the citizen voters to exercise a veto over said project.' (Conclusion of Law X)" (emphasis added)

The foregoing excerpts from third *Tacoma* and *Beezer*, decided in 1962, manifest that the Washington court no longer subscribes to the language from its second *Tacoma* decision, decided in 1957, cited by PUD to bolster its "conflict" argument. (Pet. 17.) Thus the claim fails that there is need for the issuance of a writ by this Court to permit it to act as final umpire on conflicting decisions by federal and state courts. Denial of certiorari will drop the final curtain on a legal controversy now nearly ten years old.

B. The Court of Appeals Correctly Held That the "Abstention Doctrine" Should Not Be Applied

PUD complains that the Court of Appeals should have granted its motion to defer the federal proceedings to await final outcome of the *Beezer* case (Pet. 4, 22-24). It claims that the ruling by the Court of Appeals denying PUD's motion to defer (Pet. App. A-1) "has needlessly precipitated a constitutional conflict as to whether the federal or state sovereignty shall control the eminent domain powers of state subdivisions." (Pet. 23.)

If the Court of Appeals had granted the PUD's motion to defer, it would have acted contrary to the holding of this Court in *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152 (1946). In *First Iowa*, the District of Columbia Circuit did adopt the "abstention" course. It affirmed an FPC ruling deferring action on First Iowa's application until the Iowa court construed the state statutes in question (151 F. 2d 20). This Court reversed the Court of Appeals in an 8-1 decision. The arguments advanced in *First Iowa* by the Court of Appeals and by Mr. Justice Frankfurter in his dissenting opinion are the same ones the PUD makes in its petition here. The discussion by the PUD in the most general terms of the "abstention doctrine" is not helpful to it in the light of the specific holding of *First Iowa* that FPC should not delay action on a license application to await state court vindication of

an applicant's powers to perform under a license. Furthermore, deferral of these proceedings by the Court of Appeals would have been contrary to this Court's teaching in *City of Tacoma v. Taxpayers*, 357 U.S. 320, at 336 (1958), where the Court said:

> "... Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, *and to the legal competence of the licensee to execute its terms*, must be made in the Court of Appeals or not at all. ..." (emphasis added)

No justification whatever exists for holding up the review procedure prescribed by Congress in the Federal Power Act to await the outcome of protracted collateral litigation. Application of the doctrine of abstention as requested by PUD would only add several years of unnecessary trials and appeals to a record which is already more than 21,000 pages in length.

C. The PUD's Arguments Are All Answered By the First Iowa, Tacoma and Tuscarora Decisions

PUD's plea should be recognized for what it is, a request that this Court replow old, well plowed fields. This Court held in *First Iowa* that requirements of state law which conflict with the express federal rights and powers granted by the Federal Power Act to licensees are void because of the veto power they create:

> "... Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government." (328 U.S. at 164.)

As the Court of Appeals below properly noted, *First Iowa* also holds that Section 9(b) of the Federal Power Act "does not in itself require compliance with state law; it

only empowers the Commission to require such evidence of compliance with state law as, in the Commission's judgment, would be 'appropriate to effect the purposes of a federal license on the navigable waters of the United States.'" (Pet. App. B-6.)

The PUD implies that *First Iowa* shows an intent to reserve to the states the matter of control of a licensee's eminent domain powers (Pet. 20). To the contrary, the Court expressly stated (328 U.S. at 181):

> "The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.[25] . . ."

In footnote 25, the Court lists, among other items ". . . § 21, federal powers of condemnation vested in licensee . . ."

The principle of supersedure applied in *First Iowa* was restated unmistakably in *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, at 339-340 (1958) in that portion of the opinion quoted by the Court of Appeals in its decision below (Pet. App. B-8, 9). The right of the City "'. . . to receive and perform, as licensee of the Federal Government under the Federal Power Act, the federal rights determined by the Commission and delegated to the City as specified in the license . . .'" does not, in any respect, depend on state court construction of a state statute.[3] As this Court observed, in quoting approvingly in *Tacoma* from the Ninth Circuit's opinion:

> ". . . 'Consistent with the First Iowa case, supra, we conclude that the State laws cannot prevent the Federal Power Commission from issuing a license *or bar the licensee from acting under the license* to build a dam on a navigable stream since the stream is under the dominion of the United States.' Id. 207 F. 2d at 396. (Emphasis added.)" (357 U.S. at 340.)

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[3] PUD's references to a limitation in Seattle's "charter" (Pet. App. 18, 21) are misleading at best. Seattle's charter contains no such limitation. (Tr. 17631-17702.)

PUD urges that RCW § 35.84.030 differs from the state laws under consideration in the *First Iowa* and *Tacoma* cases in that it is not a "veto" law (Pet. 22, fn. 11). There can be no doubt that this state statute, as PUD construes it, would give the state a veto power over the federally licensed project. That is precisely the result PUD seeks to achieve. The PUD is not here complaining that FPC should have licensed PUD's Z Canyon project; it asks that the City's Boundary project, found best adapted to comprehensive development, not be constructed.

If the state statute governed and were construed as PUD would have it, the Pend Oreille River would never be developed. As PUD points out, Washington law (RCW § 54.16.020) protects utility systems of cities from condemnation by PUDs (Pet. 7, fn. 4). The record shows that Seattle had already acquired property in the Boundary project area by the time of the FPC hearing (Exs. 25, 26, Tr. 17797-17800). Under PUD's interpretation of Washington law, this property would be immune from condemnation by PUD, even if the PUD were licensed by the Commission. This, coupled with PUD's construction of RCW § 35.84.030 as having a converse affect upon PUD properties, would, if controlling, bar construction by any public agency in the State of Washington. Furthermore, under Washington law investor owned power companies may not condemn municipally owned utility properties.[4]

If every piece of pasture, shoreland or unimproved right of way which happened to be acquired by a utility, as this property was by PUD, incidental to a different project (Box Canyon), were considered a "part" of its electric

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[4] Under Washington law (RCW § 80.32.060) the eminent domain powers of investor owned power companies are the same as those granted (in RCW § 81.36.010) to railroads. Railroads may not condemn municipally owned property. See *State ex rel Northern Pac. Ry. Co.* v. *Superior Court*, 136 Wash. 87, 238 Pac. 985 (1925).

system, a complete stalemate would result. If PUD's argument were once accepted, development, public or private, could be blocked forever and the purpose of the Federal Power Act, ". . . to make progress with the development of the long idle water power resources of the nation . . .",[5] would be nullified.

This Court recently reconfirmed, in *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 123 (1960), that Section 21 of the Act confers federal condemnation powers on licensees:

> ". . . we . . . hold that Congress, by the broad general terms of § 21 of the Federal Power Act, has authorized the Federal Power Commission's licensees to take lands owned by Indians, as well as those of all other citizens, when needed for a licensed project, upon the payment of just compensation. . . ."

Hence the arguments made now by the PUD in support of certiorari have been rejected at least three times by this Court, in its decisions in the *First Iowa*, *Tacoma* and *Tuscarora* cases. Unless these precedents are to be overturned, no purpose would be served in granting the PUD's petition.

D. The Court of Appeals Properly Held That the PUD's Lands Are Not Part of Its Electric System

PUD finds it "astonishing" that the Court of Appeals, as an alternative ground for its holding on the condemnation issue, decided that the PUD's lands were not part of its "electric plant or system" (Pet. 10). We in turn marvel at the PUD's surprise, since for eight long years the PUD urged FPC, through numerous filings,[6] and then

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[5] *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 171 (1945).

[6] Thus at page 6 of its "Petition for Intervention" filed August 27, 1957 upon the City's FPC application, PUD alleged:

> "Because of this statute [RCW § 35.84.030] the City of Seattle cannot condemn the properties and rights at or above Z Canyon. They constitute a 'part' of the electric power and

the Court of Appeals, to interpret the state statute in PUD's favor. Only after FPC, in September, 1961, had definitively refused to interpret the statute as barring Seattle did the PUD commence shopping (in November, 1961) for a favorable holding in the Washington state court.

PUD's statement that "FPC had expressly refused to decide or make findings" on the state law question (Pet. 10) posed by PUD is not accurate. The Examiner in denying PUD's motion to dismiss ruled:

> "The properties with which we are here concerned do not include any which were or are now being used in connection with the PUD's Box Canyon Project. On the other hand, they are also indispensable to the construction of either of PUD's alternative projects in the event that a license or licenses are issued therefor. There is, however, no evidence that such properties are otherwise important, necessary or useful as parts of the PUD's electric power and light plant or electric system." (SJA 229)

FPC adopted the Examiner's finding and decision on this question (SJA 220-221) which it characterized as a basic issue:

> "1. Whether, by reason of the laws of the State of Washington, Seattle is unable to acquire the lands

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light system owned by Public Utility District No. 1 of Pend Oreille County, Washington, which the District plans to use in the future . . ." (Tr. 19818).

As noted by Judge Donworth in his dissent in the *Beezer* opinion of July 12, 1962 (Pet. App. C-6), the PUD had made an identical allegation in January, 1954, in its "Petition for Intervention" in opposition to Seattle's application for preliminary permit.

In its "Motion to Dismiss City of Seattle Application" filed December 1, 1958, PUD made the same allegations. After reciting that the lands in question were part of its "electric power and light system" PUD concluded, "[w]ith respect to the issue presented here, the duty of the Commission is clear. For the foregoing reasons, the Motion to Dismiss the City of Seattle's application should be granted and the application dismissed." (Tr. 20291-20292).

necessary for it to effect the purposes of the license issued to it?" (SJA 219.)

In its further opinion, filed upon the PUD's application for rehearing, the Commission pointed out that because Seattle's right to acquire the PUD properties was clear under Section 21, decision of the state law question posed by the PUD was actually unnecessary to its decision (SJA 316).

As to PUD's contention that "the record furnished no grounds for deciding the state law question adversely to petitioner" (Pet. 10), the pictures PUD put in evidence (JA 130-132) show the wild character of the Z Canyon lands. They speak more eloquently than volumes of testimony in disproving the PUD's contention that the property in question is part of its "electric plant or system."

II. THE SO-CALLED CONFLICT OF INTEREST QUESTION PRESENTS NO ISSUE WARRANTING REVIEW BY THIS COURT

A. The "Conflict of Interest" Issue Posed By Petitioner Rests On Factual Assumptions Rejected By the Commission and Court Below After Exhaustive Review.

PUD's attempt to have this Court review what it paints as broad legal questions arising out of "violations of federal conflict of interest law and policy" assumes facts rejected below as against the weight of the evidence. Contrary to the basic premise of PUD's argument, the Examiner and the Commission found that the evidence in the record did not reveal conduct "within the contemplation of" Section 281 (JA 232). The fallacy of PUD's reasoning is shown by its statement that, "the issue is whether a federal regulatory agency is permitted to reject this federal policy [against conflict of interest] totally, as FPC did here." (Pet. 27.) FPC, as the Court of Appeals recognized, did not reject the federal policy. Rather it found that, "there is no conceivable conflict of interest here involved as those terms are used (even by counsel for

PUD) to describe Sections 2 and 281 of Title 18 of the Criminal Code." (SJA 232.) This finding was expressly affirmed by the Court of Appeals (Pet. App. B-3). As a brief review will show, it is solidly supported by the massive factual record developed on this issue.

The work performed on the Boundary project for J. L. Savage and Associates by Bureau of Reclamation employees in their off duty hours had no relationship to any interest of the Department of Interior in the proceedings before the Commission. The work performed was not connected in any way with the question of possible mine damage, which was treated in an entirely separate phase of the hearing (JA 5-6). In fact, as appears from the record, Mr. Winter's duties with the Bureau were entirely foreign to the development of the Pend Oreille River. His agency had long since relinquished jurisdiction of any federal development of the stream to the Corps of Engineers, retaining only its interest in water supply for irrigation upstream, to which Mr. Winter's testimony bore no remote relevance. Thus Mr. Winter did not and indeed could not purport to act in any way for the government in connection with the proceedings below. PUD itself introduced a letter from the Assistant Secretary of the Interior permitting Mr. Winter to testify before FPC with the express understanding that "Mr. Winter was not doing so on behalf of the Department, nor stating its position on any of the pending issues." (JA 89-90.)

In sharp contrast stands the activity of Mr. Wenzell involved in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961). Mr. Wenzell carried on a dual role of advising the government and advising the sponsors of the project and his associates at First Boston without the knowledge or approval of the government. As the Court there noted "he was 'working both sides of the street,' " at the same time on the same transaction (p. 543).

In addition to finding no conflict of interest the court

below ruled that the evidence showed no improper influence:

> "We find nothing in the record to indicate that there was here the 'influence peddling' at which § 281 was aimed. No corrupt or venal motive is shown on the part of Seattle or the Bureau of Reclamation engineers . . ." (Pet. App. B-5.)

This finding resulted from the uncontroverted facts showing that Mr. Winter and other Bureau people were not hired because they might influence anyone through their federal status but were hired by the Savage firm to work on Boundary because they were able engineers with long familiarity with City of Seattle engineering requirements. Their usual work for the government in Denver was so removed from the decisional processes of the FPC as to give them no more influence or opportunity for influence on FPC decision-making or policy than any engineer in private practice. Their design ideas, like those submitted by the PUD, were subjected to the crucible of public hearing and cross examination.

Nevertheless, the PUD argues:

> ". . . No one now can say how extensively their participation affected the examiner (who did state he found Winter 'most impressive'—(p. 15, *supra*), or the FPC staff, or others in FPC, on questions of cost, power production, financial feasibility, mine damage, and other elements of the two competing applications on which comparison was being made. . . ." (Pet. 29)

No speculation is necessary. The FPC staff engineers rated the Savage design third best of the three layouts for a high dam presented to them. They gave the PUD's own High Z Canyon project a benefit-cost rating of 2.24 as contrasted with 2.01 for the Savage design. Indeed, it was this unfavorable comparison which caused the City to submit

on rebuttal a rock-fill dam and underground powerhouse layout, developed by Raymond A. Hill and the Bechtel Corporation as an alternative to the concrete dam-surface powerhouse design presented by Hammond and Winter in the City's case in chief. The FPC found the Hill-Bechtel design superior to both the PUD's High Z and the Savage Boundary plans.

PUD does not challenge the findings below that the record establishes absolutely no "influence peddling" but contends that the statute is not concerned with this at all. To the contrary, this Court has construed this element as the heart of the statute. In *Burton* v. *United States*, 202 U.S. 344 (1906), which upheld the conviction of a United States Senator for receiving money to represent a private corporation before the Post Office Department, this Court said:

> ". . . *Evidently the statute has for its main object to secure the integrity of executive action against undue influence* upon the part of members of that branch of the government, whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. . . ." (p. 368; emphasis added.)

The interpretation given Section 281 in the *Burton* case was recently repeated by the Attorney General in an opinion released March 7, 1962:

> "The general purpose and thrust of the statute are clear from its language and from its legislative history. It was designed to prohibit a Member of Congress or a Government officer or employee from using whatever influence or purported influence he might have anywhere in the Government departments or agencies as a means of obtaining income from outside sources . . .
>
> ". . . The Statute thus manifests that its primary objective is to prevent the corrupt selling of influence."

(42 Ops. Att'y. Gen. No. 6 dated January 31, 1962, printed slip opinion, p. 9-10).[7]

Finally, PUD insists that the record shows at least a technical violation (Pet. 29). But neither the Examiner, the Commission nor the Court of Appeals found any violation of any type (Examiner, JA 232; Commission, JA 220, 317; Court of Appeals, Pet. App. B-4, B-5). In the absence of any finding of violation and in the light of express findings that the record shows "no conceivable conflict of interest" or "influence peddling" it is difficult to see how there exists any legal policy question requiring review on certiorari.

B. The Court of Appeals Correctly Held That the Public Interest Did Not Require the Refusal of a License

Nowhere in its petition does the PUD mention the alternate holding of the Court of Appeals, based on the *Dixon-Yates* case, that the Government may find it contrary to the public interest to refuse or void a license for a needed hydro-electric project even assuming Section 281 applied:

> "But the Dixon-Yates case does not hold, nor does any other authority to our knowledge, that a transaction is automatically void because there may have been involved in it a technical violation of the conflict of interest statutes. Neither the Government nor any of its agencies has attacked the grant of a license to Seattle as being contrary to the public interest be-

[7] The material quoted by PUD from the same opinion by the Attorney General (Pet. 26) must be read in the context of such direct statements elsewhere in the opinion as, "the purpose for which this statute [Section 281] was written . . . is, to prevent the sale of influence by Congressmen and regular Government employees . . ." (p. 10), "the conduct aimed at by the statute—i.e., influence selling . . ." (p. 12) and "clearly the statute, as indicated by the severe penalties it imposes, is aimed at venal conduct." (p. 13)

cause of the alleged violations of § 281. . . ." (Pet. App. B-4.)

The PUD argues that since the Commission did not agree with it that the alleged violations of Section 281 required automatic exclusion of otherwise competent and relevant evidence, the Commission ignored Section 281. The FPC did not ignore the statute; rather, after careful consideration of the facts and law, it rejected the conclusions which the PUD asked it to draw. The record demonstrates that both the Examiner and the Commission were keenly aware of their duty to develop a full record concerning the PUD's contention and to give the matter whatever weight it deserved in reaching a decision. The Examiner repeatedly emphasized this point during the hearing. For example, he agreed that the Commission could not "close their eyes" to Section 281 (JA 26), and that the Commission "must take cognizance of" the policies underlying Section 281 (JA 27, 36).

In its decision the Commission had to determine what, if any, relevance Section 281 and the policy underlying it had, under the facts presented, to the duties delegated to FPC by Congress. Section 10 of the Federal Power Act (16 U.S.C. § 803) authorizes the Commission to issue licenses for the development of the nation's water resources for projects found "in the judgment of the Commission [to] be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce . . ." The Act was designed not merely to regulate existing conditions but actively to promote the development of the nation's water resources. *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 180 (1946). In recognition that this new broad policy would require the Commission to consider all relevant evidence, Congress vested the Commission with broad subpoena and other powers to acquire the full facts

necessary for the exercise of its licensing jurisdiction. (See 16 U.S.C. §§ 793, 797(e), 803(a), 825f(a) and 825f(g).

PUD's attempt to exclude otherwise competent and relevant evidence by invocation of Section 281 went to the heart of the Commission's powers to effectuate the policies and purposes of the Federal Power Act for the development of the nation's water resources. The PUD in effect would have Section 281 veto all these other statutes and important policies which the Commission must consider, regardless of their effect upon the public interest. This Court has on several occasions rejected similar arguments attacking agency findings. *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80 (1944); and *SEC* v. *Chenery Corp.*, 332 U.S. 194, 204-207 (1947).

The court below noted that Section 281, "a criminal statute, prescribes no civil or administrative sanctions." (Pet. App. B-5.) Its construction of *Dixon-Yates* as vesting the Government with an option to consider other public policies in determining whether to disavow a transaction has now been expressly confirmed by Congress. The Act of October 23, 1962 (76 Stat. 1119, 1125-26) which repealed Section 281 and other "conflicts" statutes in a thoroughgoing revision, provides:

> "218. In addition to any other remedies provided by law the President or, under regulations prescribed by him, the head of any department or agency involved, *may* declare void and rescind any contract, loan, grant, subsidy, license, right, permit, franchise, use, authority . . . by or for any agency of the United States or officer or employee of the United States or person acting on behalf thereof, *in relation to which*

there has been a final conviction for any violation of this chapter . . ." (emphasis added.)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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